MOTION FILED
SEP 13 2006

No. 06-223

In The
Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code City,

Respondent.

On Petition For A Writ Of Certiorari
To The Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICI CURIAE OF THE MASTER BUILDERS ASSOCIATION OF PIERCE COUNTY IN SUPPORT OF PETITIONERS JOHN DREBICK AND JANE DOE DREBICK, HUSBAND AND WIFE, D/B/A DREBICK INVESTMENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the Master Builders Association of Pierce County (Washington State) (hereinafter "MBA") moves to file the attached brief in support of the Petition for Writ of Certiorari. Consent has been given by Petitioner and that consent will be lodged with this Court. Respondent, however, has withheld consent thus necessitating the filing of this motion.

MBA seeks to supplement Petitioner-Drebick's arguments by illustrating that there is a wide split of authority among the lower state and federal courts over the question of whether legislatively imposed exactions and monetary exactions are subject to the "essential nexus" and "roughly proportional" standards enunciated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1994) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

MBA also seeks to demonstrate that unfair and disproportionate exactions can, and do, occur whether they are imposed legislatively or adjudicatively or whether such exactions include a dedication of land or are monetary in nature.

The opinion below holds that the heightened scrutiny set forth by this Court in *Dolan* is not applicable to legislatively imposed monetary exactions. As a result, the lower court's ruling stands for the proposition that when monetary conditions are imposed legislatively on property owners, the conditions need not be roughly proportional to the impact created by the proposed development. The accompanying brief of amicus curiae suggests that this is a serious conflict that should be resolved by this Court. For

these reasons, MBA respectfully requests permission to file the attached brief amicus curiae.

DATED: September 13, 2006

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	INTERESTS OF AMICI CURIAE	1
II.	REASONS FOR GRANTING THE PETITION	2
III.	ARGUMENT	4
	A. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT AMONGST STATE AND FEDERAL COURTS	4
	1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions As Well As Involving Dedications	4
	2. State And Federal Courts Are Split As To Whether *Dolan* Applies To Legislative Actions	5
	B. *DOLAN* APPLIES TO MONETARY EXACTIONS	7
	C. *DOLAN* APPLIES TO LEGISLATIVE ACTIONS	10
	1. The Fifth Amendment Applies To Fees Adopted By Legislative Action As Well As Adjudicative Action	10
	2. Concern For A Heightened Risk Of Extortion Requires *Dolan*'s Application to Legislatively Adopted Fees	15
	3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause	18
IV.	CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) 19

Altimus v. Oregon, 115 S. Ct. 44 (1994) 11

Arcadia Development Corp. v. City of Bloomington, 1996 Minn. App. LEXIS 930 (August 13, 1996) 6

Armstrong v. United States, 364 U.S. 40 (1960) 8

Art Piculell Group v. Clackamas County, 1996 Ore. App. LEXIS 1107 (July 31, 1996) 6

Benchmark Land Co. v. City of Battle Ground, 146 Wn.2d 685 (2002) 12, 13

Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915) 16

Blue Jeans Equities West v. City and County of San Francisco, 221 Cal.App.3d 1072 (1992) 4

Board Of Trustees Of Keene State College et al. v. Sweeney, 439 U.S. 24 (1978) 8

California Building Industry Association v. Governing Board of Newhall School District, 206 Cal.App.3d 212 (1988) 17

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 8

City of Olympia v. Drebick, No. 29018-9-II, 2004 WL 102850 (Wash.App. Div. 2 Jan. 22, 2004) 14

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 4, 9

Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) 5

Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) 5

TABLE OF AUTHORITIES – Continued

Page

College Station v. Turtle Rock, 680 S.W.2d 802 (Tex. 1984) 4, 7

Collis v. Bloomington, 246 N.W.2d 19 (1976) 4, 7

Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998) 6

Dolan v. City of Tigard, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ..... *passim*

Ehrlich v. City of Culver City, 512 U.S. 1231, 114 S. Ct. 2731 (1994) 8

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996) 4, 5, 6, 15, 19

Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998) 5

Harris v. City of Wichita, 862 F.Supp. 287 (D. Kan. 1994) 6

Home Builders Association of Central Arizona v. City of Scottsdale, 902 P.2d 1347 (Ariz. 1995) 4, 6, 8

Home Builders Association of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) 5

Horn v. County of Ventura, 596 P.2d 1134 (1979) 16

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wash.2d 740, 49 P.3d 867 (2002) 9, 12, 13

J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. 1994) 6, 11

James v. County of Kitsap, 152 Wash.2d 574, 115 P.3d 286 (2005) 9, 10

Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966) 4, 8

TABLE OF AUTHORITIES – Continued

Page

Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) 7

Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001) 6

Loyola Marymount Univ. v. Los Angeles Unified School District, 45 Cal.App.4th 1256 (1996) 6

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995) 6, 7

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) 4

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 16

National Association of Home Builders v. Chesterfield County, 907 F.Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996) 4, 6

Nixon v. United States, 506 U.S. 224 (1993) 19

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 8, 10, 11, 15, 18

Northern Illinois Home Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 4, 6, 9

Parking Association of Georgia, Inc. v. City of Atlanta, 115 S. Ct. 2268 (1995) 6, 7

Remmenga v. California Coastal Comm'n, 163 Cal.App.3d 623 (1985) 4

Rogers Machinery, Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) 6, 11

San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87 (Cal. 2002) 5

Southeast Cass Water Resource District v. Burlington Northern Railroad Co., 527 N.W.2d 884 (N.D. 1995) 6

Stubblefield Construction Co. v. City of San Bernardino, 32 Cal.App.4th 687 (1995), *cert. denied*, 116 S. Ct. 300 17

Trimen Development Company v. King County, 877 P.2d 187 (Wash. 1994) 4, 6, 9

U.S. v. Winstar Corp., 1996 U.S. LEXIS 4266 (July 1, 1996) 18, 19

Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1995) 6

STATUTES

RCW 82.02.020 ..... 9, 12, 13

RULES

Supreme Court Rule 10.1(b) 2

Supreme Court Rule 10(c) 3

Supreme Court Rule 37(6) 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 8, 15

U.S. Const. amend. XIV 8

U.S. Constitution, Contract Clause 19

OTHER AUTHORITY

"*Governor Holds The Key To Affordable Housing*," President's Letter, BIAW's *Building Insight* Publication, August 2006 18

I. INTERESTS OF AMICI CURIAE[1]

The Master Builders Association of Pierce County is a "not-for-profit" corporation organized under the laws of the State of Washington. The Master Builders Association of Pierce County (MBA) consists of nearly two thousand home building professionals and related service providers. The MBA promotes the interests of the home building industry through membership involvement, legislative action, networking and education while maintaining the highest ethical standards.[2]

The MBA actively challenges impact fee abuse issues such as the fee which is the subject of this case. For example, on February 28, 2006 the City of Bonney Lake, Washington within Pierce County voted to increase park impact fees from $2000 per single family lot to $2893 per lot. MBA provided testimony twice in opposition to the increase.

The City of Puyallup, Washington within Pierce County recently increased its park impact fees from $491 SF/$323 MF to $2300 for both Single Family and Multi-family units. The City of Puyallup also adopted a road impact fee at $3030 per Single Family unit. The MBA opposed these huge increases.

In addition, the Master Builders Association of Pierce County is one of fifteen local homebuilders associations under the umbrella of the Building Industry Association of Washington (BIAW) representing more than 12,254

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[1] Pursuant to Supreme Court Rule 37(6), counsel of amicus authored the brief in whole. Amicus solely funded the preparation and filing of this brief.

[2] The Master Builders Association of Pierce County's Vision Statement is

1. Be the leader and advocate of affordable housing.
2. Be a strong and financially viable association.
3. Provide tangible membership values.
4. Maintain a positive public image.

member companies who are threatened by onerous regulations. BIAW works to reduce the scope of government and expand free enterprise. BIAW submitted an amicus curiae brief in this present case before the Court of Appeals and the Washington State Supreme Court.[3]

The MBA Amici's interests lie in countering local governments' funding needs with the needs of the new home buyer for affordable shelter. Local jurisdictions in Washington State continue to increase impact fees used to fund facilities and services used by the public in general but charged to an isolated segment of the population – the development community.

Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. Additionally, a 10-20% miscalculation could result in significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p. 6

II. REASONS FOR GRANTING THE PETITION

The Court should accept certiorari for at least the following reasons. First, pursuant to Supreme Court Rule 10.1(b), review is supported when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or with a United States court of appeals.

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[3] The Building Industry Association of Washington Mission Statement declares that "The Building Industry Association of Washington is the voice of the housing industry in the state of Washington. The Association is dedicated to ensuring and enhancing the vitality of the building industry for the benefit of its members and the housing needs of the citizens." To accomplish this purpose, the Association's primary focus is to interact with the Legislative, Regulatory, Judicial and Executive Agencies of Washington's government.

Second, Supreme Court Rule 10(c) provides for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both grounds support review of this case.

Certiorari should be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard,* 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (hereinafter "*Dolan*") applies to legislatively enacted monetary exactions and whether public agencies possess a compensable property interest in maintaining the perpetuation of land-use designations.

Monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. If monetary exactions receive less scrutiny, local governments can impose onerous fees on one population segment (the development community) for facilities or services which serve the general community as a whole, and avoid the requirement of establishing a nexus between the event triggering the exaction and the resulting fee. The law does not permit public agencies to do indirectly what it does not permit them to do directly.

Additionally, there remains a heightened risk of disproportionality and/or extortion for legislatively authorized fees. Legislative acts do not enjoy absolute deference to the extent that constitutional protections be abandoned. The Constitution applies equally to legislative as well as adjudicative acts.

Nor is the political process adequate protection against legislative abuse. When legislatively applied, notice is not required or often provides to the targeted fee payor, the payor may not yet be invested in the issue (as in the case of fee imposed on ***future*** home buyers), and if applied to an isolated segment, the balance of the voting constituents likely will not object.

III. ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT AMONGST STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions As Well As Dedications.

There is a well-developed split on whether *Dolan* extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or approved of applying a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City,* 911 P.2d 429 (1996) (hereinafter "*Ehrlich*"); *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock,* 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington,* 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n,* 163 Cal.App.3d 623, 628 (1985).

At least two federal cases have suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee); *National Association of Home Builders v. Chesterfield County,* 907 F.Supp. 166, 168 (E.D. Va. 1995), *aff'd,* at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996).

Conversely, some state courts have either directly limited *Dolan*'s applicability to dedications, or implied such is true. *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995); *Blue Jeans Equities West v. City and County*

of San Francisco, 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera,* 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991).

Finally, a number of states merely express confusion over the issue. *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (there is "considerable doubt" about the applicability of the *Dolan* rough proportionality test to "legislative, as opposed to administrative exactions."); *Home Builders Association of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (the question "has not been settled"); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 976 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (A "split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation").

2. State And Federal Courts Are Split As To Whether *Dolan* Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[4] that the exaction in *Dolan* was imposed on a building permit, issued as an "adjudicative" act, to find that heightened scrutiny does not apply to exactions imposed pursuant to legislatively-adopted ordinances of general application. *See San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 105-06 (Cal. 2002) (Court refusing to apply *Nollan/Dolan*'s standards to legislative impact fee); *e.g., Homebuilders Association v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan's* rough proportionality test does not apply to water service fee enacted by ordinance and uniformly applied to all properties); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996) (*Dolan*

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[4] *Dolan, supra*, 114 S. Ct. at 2316, n.8.

inapplicable to fees imposed legislatively); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Dolan* inapplicable to sanitation district fee imposed legislatively); *Rogers Machinery*, 45 P.3d at 967, 982 (*Dolan* inapplicable to traffic impact fee assessed by ordinance), *Ehrlich, supra*; *Loyola Marymount Univ. v. Los Angeles Unified School District*, 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995); *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.*, 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994); *Arcadia Development Corp. v. City of Bloomington*, 1996 Minn. App. LEXIS 930 (August 13, 1996). So too has at least one federal court. *Harris v. City of Wichita*, 862 F.Supp. 287 (D. Kan. 1994).

Other state courts have held that legislative exactions are subject to *Dolan*'s heightened scrutiny. *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Nollan* applied to statute requiring apartment owners to renew certain leases with non-private hospital employees); *Art Piculell Group v. Clackamas County*, 1996 Ore. App. LEXIS 1107 (July 31, 1996); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1994); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County*, 877 P.2d 187 (Wash. 1994) (A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test). So too has at least one federal court. *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) ("[I]n order for *any specific exaction implemented under a zoning ordinance* to pass constitutional muster . . . " it must meet *Dolan*'s rough proportionality standard.), *aff'd*,

at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996). *Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961, 1962 (1995).

One existing and one former member of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis.... The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, 115 S. Ct. 2268 (1995) (Thomas, J., and O'Connor, J., dissenting).

B. *DOLAN* APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. This is because several of the cases relied upon by this Court for the rough proportionality standard in *Dolan* involved takings challenges to fees.[5] *E.g., Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington,* 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock,* 680 S.W.2d

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[5] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions ... requiring developers to dedicate either a percentage of the entire parcel ... or an equivalent value in cash ... to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

802 (1984); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966).

In addition, this Court's decision to vacate and remand the Court of Appeal's original decision in *Ehrlich v. City of Culver City,* 512 U.S. 1231, 114 S. Ct. 2731 (1994) was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[6] The Arizona Court of Appeals took note of this significant action in *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

The Constitution supports this position. The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There is scant justification for subjecting impact fees to a lesser degree of scrutiny than dedication requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently creates a giant loophole in the *Nollan/Dolan* doctrine.

Allowing fees to be reviewed under a lesser degree of scrutiny provides government the incentive and ability to demand mitigation through fees exclusively. Nothing prevents government from exacting a fee, exercising its

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[6] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney,* 439 U.S. 24, 25-26 (1978).

power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, the owner is no less diminished by a monetary fee, than by a dedication requirement.

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that *Dolan*'s rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire.

In *Trimen Development Company v. King County,* 877 P.2d 187, 192 (1994), the Washington Supreme Court applied *Dolan*'s heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), the Illinois Supreme Court subjected a transportation impact fee to *Dolan*'s heightened scrutiny.

Of interest, a very recent Post-*Dolan* Washington Supreme Court case held that dedications and fees should be evaluated similarly. In *James v. County of Kitsap*, 152 Wash.2d 574, 115 P.3d 286 (2005), the Washington Supreme Court relied on *Isla Verde,* 146 Wash.2d at 761, 49 P.3d 867[7], to hold that development conditions must be tied to a specific, identified impact of a development on a community, **whether the condition is an open space set aside or an impact fee.** However, neither *Isla Verde*

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[7] "For instance, in *Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wash.2d 740, 49 P.3d 867 (2002), we reviewed an action brought by a developer under LUPA, challenging a permit condition as invalid because it was a tax, fee, or charge prohibited by RCW 82.02.020. Although *Isla Verde* did not involve impact fees, but a permit condition requiring a 30 percent open space set aside, we concluded this condition was a "tax, fee, or charge" under RCW 82.02.020 and was invalid because it did not fall within an exception to that provision."

or *James* relies on *Dolan*; instead these cases were decided on statutory grounds. *Id.*

C. *DOLAN* APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan,* like the City's transportation impact fee here, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and greenway/drainage space. *Dolan, supra,* 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions . . . , but the permit conditions were imposed pursuant to Tigard's Community Development Plan.

Dolan, *supra,* 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was imposed on a specific project pursuant to an essentially legislative determination applicable to all development projects.

Indeed, *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976: The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. at 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with

a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra,* 114 S. Ct. at 2316, n.8, as limiting the application of *Dolan* and *Nollan.*

Subsequent to its decision in *Dolan*, the Supreme Court has confirmed that *Dolan* applies to legislative acts. In *Altimus v. Oregon,* 115 S. Ct. 44 (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard.*" *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change – a legislative act. (See footnote 5, *supra.*)

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition] remains the type that is subject to the analysis in *Dolan*" . . . , whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed.

Id. at 365, n.1 (citation omitted). *See also, Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1994) (*Dolan*'s

heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least two post-*Dolan* Washington decisions are in accord, although neither are decided on constitutional basis. In July, 2002, the Washington Supreme Court decided two pivotal cases that refine the authority of municipalities to impose conditions requiring set-asides and impact fees. These cases mandate that any dedication or fee must be roughly proportional to the actual impacts of the proposed project, and place the burden of demonstrating proportionality on the local jurisdiction. *See Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002); *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740 (2002).

The Washington Supreme Court case of *Benchmark* emphasizes the long standing requirement that an essential nexus between the actual impacts caused by the proposed development and conditions imposed on the development. The related case of *Isla Verde* held that dedication or payment of impact fees that are not reasonably necessary as a direct result of the proposed development violate RCW 82.02.020.

The Court mandates that any fees or dedications must be attributable to specific impacts from the proposed development. Plat conditions or other development extractions which are not factually supported as required in these recent holdings, are incorrect as a matter of law.

In *Benchmark*, the City of Battle Ground conditioned approval of a development permit, requiring the developer to make improvements to a street adjoining the development. The city's required improvements were frontage based on the city code standards, but were not tied to the specific impacts of the project. The Court found that the requirements were intended to remedy an existing deficiency, and bore little relation to the proposed project. The Court held that the conditions were not supported by substantial evidence; because there was no showing that "the required expenditure for street improvements was not

directly related to traffic generated by the development." *Benchmark*, 146 Wn.2d at 695. The holding clearly specifies that any fees or dedications must be attributable to specific impacts from the proposed development.

In *Isla Verde*, the Court also applied the proportionality requirement to the specific statutory framework set forth in RCW 82.02.020, to invalidate a 30 percent open space set-aside condition required by the City of Camas. *Isla Verde*, 146 Wn.2d at 752. The Court recognized that RCW 82.02.020 does not only prohibit City-imposed taxes on the development of real property, but also fees and charges, including dedications as well. *Id.* at 753, n.8. The only exception is where the city is able to demonstrate that the condition imposed is needed as direct result of the project's impact. *Id.* at 759. The Court also stated that the burden of proving the required relationship between the condition and the impact of the development rested on the city. *Id.* at 756.

Because the Court recognized that RCW 82.02.020 applies not only to taxes and fees, but also to requirements and conditions such as open space set-asides, (*Id.* at 757), the Court invalidated the City's open space requirement, holding that Camas failed to produce sufficient evidence that "the 30 percent open space set aside is ***reasonably necessary*** as a ***direct result*** of the proposed subdivision or reasonably necessary to mitigate a direct impact that is a consequence of the proposed subdivision." *Id.* at 759. Finally, the Court emphasized that, not only must the requirement be "reasonably necessary," but that "development conditions must be tied to a ***specific, identified*** impact of a development ... as a direct result of the proposed development or plat," *Id.* at 761.

The Court stressed that RCW 82.02.020 does not permit conditions that satisfy a "reasonably necessary" standard for all new development ***collectively***; it specifically requires that a condition be "reasonably necessary as a direct result of the proposed development or plat." *Isla Verde* at 879. Emphasis added.

Thus in these post *Dolan*, pre-*Drebick* cases, the Washington Supreme Court made it clear that cities and counties cannot simply point to an adopted code provision as authority to impose development extractions (in this case, frontage improvements). Instead, the Supreme Court held that the jurisdiction is required to undergo an individualized analysis for each project, and can only impose a condition on development if it is shown that the condition is needed to mitigate an impact ***actually caused*** by the proposed project.

The Court of Appeals' decision in the present case followed this clear line of reasoning consistent with *Nollan/ Dolan*. *City of Olympia v. Drebick*, No. 29018-9-II, 2004 WL 102850 (Wash.App. Div. 2 Jan. 22, 2004), when it invalidated the City of Olympia's traffic impact fee. The Court found that an impact fee formula which was based on an averaging of traffic volumes did not relate to the actual impacts of a proposed project. The Court of Appeals correctly invalidated the City's assessment, and found that impact fees must relate to the actual impacts of the development.

In invalidating Olympia's development condition, the Court clearly stated that (1) the government must identify a "public" impact as opposed to a private one, (2) the government must show that the *proposed project* will create or exacerbate the impact, (3) the government must show that the fee or exaction "tends to solve" or alleviate the impact, and (4) that the proposed solution is "roughly proportional" to the impact of the proposed project, i.e. that it will alleviate the impacts caused by the project itself.

Unfortunately, the Washington Supreme Court reversed.

This Court should accept review to correct this change of course, and provide clarity on a nation-wide basis.

2. Concern For A Heightened Risk Of Extortion Requires Dolan's Application to Legislatively Adopted Fees.

The Washington Supreme Court sidestepped the *Nollan/Dolan* test by its limited decision to an interpretation of the requirements of the local impact fee statutes (App. at A-8-A-11; App. at G and H), and on its refusal to apply the *Nollan* and *Dolan* standards to the exactions at issue (App. A-11-A-12).

However, despite ducking the critical constitutional issues, the Court's scathing comments directed to dissent sow the seeds for a significant withering of future application of *Nollan/Dolan* in Washington state: "The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approved on a property owner's dedication of a portion of land for public use." App. at A-11-A-12. The majority cites *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996), for the proposition that *Nollan* and *Dolan* do not apply to legislatively prescribed development fees. *Id.* at A-12-A-13.

This Court should reinforce application of the constitutional analysis of *Nollan/Dolan* by upholding the constitutional construction of the local impact fee statutes, as urged by the dissent. App. at A-33-A-37. Citing the Court of Appeals decision, the dissent noted that "the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" App. at A-33. The majority, "defeats the *Nollan* and the Washington State Legislature's definition [of 'reasonably related']." App. at A-36.

The Washington Court's rationale in part was based on deference owed to legislatively adopted fees, as opposed to administrative conditions. However, preservation of this Court's constitutional protections against extortion-like

fees requires that legislative actions **not** be treated differently from exaction imposed administratively. The heightened risk of extortion exists ***no less*** for legislatively adopted fees, and arguably presents a ***greater*** risk.

Current residents, looking out for their own interests, generally believe that it is better to shift facility costs to their ***future*** and yet unknown neighbors, rather than pay for such facilities themselves. The existing residents have no quarrel with legislators who pass along a disproportionate share of facility costs to the upcoming but not yet present community members.

In contrast, the new home buyer has the least political clout to remedy extortionate fees because he or she is an empty chair at that political table, unaware, uninterested or residing outside of the public agency's jurisdiction at the time of the fee's adoption.

In addition, there is no requirement that a new or future home buyer be given notice of a legislatively adopted fee and therefore this class of affected parties is the least able to become involved in the "political process."[8]

Elected officials and current residents, aware of these facts, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent, has no notice, and may not yet be interested in the issue until

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[8] Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915).

"[O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements." *Horn v. County of Ventura*, 596 P.2d 1134, 1137 (1979); *see also, Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

the new home threshold is crossed, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[9] As a result, the risk of extortion by legislation for it is just as high, if not higher than it is for those which are individually imposed.

Further, a legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific project and are therefore more likely to provide notice to the new home buyer.

Impact fees are fees tacked onto the cost of a newly constructed house to pay for the occupants' supposed impact on the area's roads, parks and schools. Depending on the jurisdiction, impact fees can range from a few thousand dollars to over $20,000. Not coincidentally, jurisdictions charging impact fees typically boast the least affordable housing markets.

> . . . because impact fees are charged only on new homes, not on existing homes, they don't ensure those who have a new impact on a community actually pay to mitigate that impact. Here's an example: A family with six school age children could move into Olympia from elsewhere, purchase an existing "family" home and pay no impact fee, even though they will be impacting the city's

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[9] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District*, 206 Cal.App.3d 212, 218 (1988) (" . . . the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 711 (1995), *cert. denied*, 116 S. Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents* . . . Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

> schools, roads, parks, etc. Meanwhile, an "empty-nester" couple that sells that "family home" in Olympia and purchases a newly constructed "move-down home" up the street, will pay exorbitant impact fees, even though they are having no new impact (in fact – they've already paid for it!). Hardly a fair and efficient way to pay for growth.

"*Governor Holds The Key To Affordable Housing*," President's Letter, BIAW's *Building Insight* Publication, August 2006.

Legislatively adopted fees, no less than excessive regulations and onerous procedures, limit the number of homes that can be built, increase the cost of those that are built, and reduce the affordability of all homes. The result, sometimes intended, is to restrict those who can live in some areas to only the wealthiest. The greatest impact falls on those with limited incomes, such as young families, first time home buyers, minorities, and others with limited incomes. These classes of persons in Washington State deserve the constitutional protections that *Nollan/Dolan* affords.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause.

The separation of powers doctrine supports that greater deference be paid to a public agency's legislative, as opposed to adjudicative, actions. Yet, nowhere does this policy of greater deference require a reviewing Court to ignore Constitutional protections.

In *U.S. v. Winstar Corp.*, 1996 U.S. LEXIS 4266 (July 1, 1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at stake. *Id.* at 100, n.41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not 'force some people alone to bear public burdens which . . . should be borne by the public as a whole.'[10] *Id.*

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[11]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States,* 506 U.S. 224, 238 (1993).

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[10] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra,* at 76-77. As this Court noted, *supra,* the exactions in *Dolan* were based on legislative enactments.

[11] The government in *Winstar* argued that a standard almost identical to the *Agins v. Tiburon*, 447 U.S. 255 (1980) test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra,* at 93-94. The *Ehrlich* Court suggested that the test for legislative actions should be whether they substantially advance a legitimate governmental purpose. As this Court rejected the test proffered by the government in *Winstar,* so should it reverse the California Court's deferential standard applied to legislatively enacted, generally applicable fees.

IV. CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the MBA Amicus pray that this Court grant certiorari and reverse the Washington Supreme Court's opinion by applying *Dolan* to monetary exactions and by applying *Dolan* to legislative actions.

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or pay money to public agencies as a condition to granting land use, subdivision, and even non-discretionary construction approvals. In this case, a city required a developer – in fact requires all developers within its jurisdiction – to pay a fee that was based not on the specific impact of a particular development, but on the average impact of all anticipated development in the city. This case thus presents two issues of great importance to NAHB and its members.

First, do the requirements of *Nollan* and *Dolan* apply to impact fees that are imposed on property owners as a condition of permit approval, where those fees have the same economic impact on property owners as dedications of land? This Court's previous pronouncements place impact fees with such effects squarely within the category of "exactions," a form of taking that constitutionally requires just compensation. NAHB members need this Court's protection when impact fees threaten to become "not a valid regulation of land use but 'an out-and-out plan of extortion'" (*Nollan*, 483 U.S. at 837), just as much as they do when the government requires a dedication of land.

Second, may a local government avoid *Dolan*'s requirement of "rough proportionality," and its attendant burden on the local government of making an individualized determination, by passing a legislative exaction on an area-wide basis? NAHB members need this Court to rule that government may not use its permitting power to force *all* new developments to pay more than their fair share, any more than government may require *one* development to pay more than its fair share.

The protection from over-reaching and excessive governmental exactions embodied in *Dolan* is particularly important in the context of affordable housing. By shifting disproportionate costs of public services on to new housing,

exactions that do not comport with *Dolan* erect more imposing barriers to affordability. These barriers compound what is already a significant and serious social problem plaguing this country.

The lower courts have reached inconsistent and conflicting results when faced with these issues. Absent a clear ruling from this Court, NAHB members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. The Takings Clause is intended to prevent what occurred in this case and what home builders endure time and again: a local government forcing one landowner to bear the entire economic cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

SUMMARY OF ARGUMENT

Exactions are a type of taking that can trigger the payment of just compensation under the Fifth Amendment. Impact fees are one category of exaction. In the exaction context, the requirements of the Takings Clause assure property owners that the government must make an individualized determination of whether an impact fee is "roughly proportional" to the impact of a proposed development; and further guarantee that, when it is not, the government will be required to pay back the excess.

Exactions have the same economic impact on property owners whether they are imposed by legislation or adjudication, and *Dolan*'s requirements of individualized determination and "rough proportionality" should apply regardless of how the exaction is imposed.

By imposing excessive costs on development when impact fees or other exactions are levied without meeting the requirements of *Dolan*, local governments discourage the construction of affordable housing.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES EQUALLY TO EXACTIONS THAT ARE IMPACT FEES AND EXACTIONS THAT REQUIRE DEDICATIONS OF LAND.

As explained in the petition for *certiorari*, some of the courts that have refused to apply the *Nollan-Dolan* requirements to impact fees have viewed such fees as somehow categorically different from mandatory dedications of land. However, no abstract conceptualization or "critical leap" is necessary to equate these economic burdens. *Cf., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). Practically speaking, impact fees are simply one variety of exaction. In the land use context they must meet the constitutional requirements set forth in *Nollan* and *Dolan* to make sure that land use regulations do not over-reach by requiring the property owners who need a permit to bear economic costs that should be borne by the public as a whole.

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) summarized the kinds of takings that trigger the payment of just compensation. First, the "paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Id.* at 537. Second, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* *Lingle* further clarified the "theories" available for "a plaintiff seeking to challenge a government regulation as an uncompensated taking" (*Id.* at

548) as encompassing regulations which: force a physical occupation, *e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); deprive a property owner of all economically viable use of the property, *e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); or "go too far" so as to become the functional equivalent of a traditional taking, *e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The final category of regulatory taking is "a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle*, 544 U.S. at 548. Exactions are a special application of the doctrine of "unconstitutional conditions," which provides that the government may not require a person to give up a constitutional right – such as the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. *Dolan*, 512 U.S. at 385.

The lower courts have developed a detailed understanding of exactions. They come in four recognizable categories: "(1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006).

The key to *Dolan*'s application of the Takings Clause to exactions in the land use context is that, in substance, it prevents governments from over-charging new development for the external, public costs it creates. Under *Dolan*, the exaction must be roughly proportional to the impact of the new development, as measured in an individualized determination made by the permitting body. If not proven to be roughly proportional, the Fifth

Amendment requires that compensation be paid for the excess. In this regard, disproportionate impact fees clearly fall within *Dolan*'s ambit just like other forms of exactions.[2]

Under the proper application of *Nollan* and *Dolan*, the "taking" only occurs where, and to the extent that, the monetary exaction exceeds what may be charged to the particular development under the rough proportionality test. Where a monetary exaction goes beyond the impact of the development, the local government is requiring the new development to shoulder a burden that should be borne by the public as a whole, and thus effects a taking. The constitutionally-required just compensation is then a return of that portion of the monetary fee constituting overpayment. In this regard, takings analysis is more finely tuned than substantive due process analysis when applied to impact fees. The former requires that an excess be paid back to the developer but allows the government to keep the justifiable portion of the fee. The latter simply invalidates the entire fee.

Even though this Court has made it clear that takings claims involving land use exactions in the form of physical dedications of property are evaluated under the *Dolan* "rough proportionality" test, the lower courts appear to

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[2] Some argue that five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) agreed that the Takings Clause did not apply to the mere payment of money, thus resolving the applicability of *Dolan* to impact fees. However, one of the five was Justice Kennedy, who confined his objection to a monetary obligation that was not imposed with respect to or on a particular property. 524 U.S. at 540. Impact fees are, of course, imposed with respect to development that occurs on a particular property, and so Justice Kennedy's opinion in *Eastern Enterprises* did not resolve the issue.

believe that applying *Dolan* to impact fees and monetary exactions "is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Ore Ct. App. 2003). *Compare Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429 (1996), *cert. denied*, 519 U.S. 929 (1996) (at least those monetary land use exactions that are imposed "on an individual and discretionary basis" are subject to *Dolan* scrutiny) *with Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) (all monetary land use exactions are subject to *Dolan*, whether imposed on an individual, discretionary basis or area-wide) *and Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821, 825 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214, 1219 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications).

This Court should clear the air. From a land owner's perspective, there is no practical distinction between exactions requiring land dedications and exactions requiring the payment of money. Each has an identifiable economic impact on the builder or property owner. Each is susceptible of the same kind of abuse by government. Each can be easily remedied by application of the just compensation requirement. (In fact, it may be easier to require just compensation for monetary exactions than for exactions of real estate. When the latter cannot meet the rough proportionality standard, a court must determine the value of the excess land that was taken by the permitting authority. This step is unnecessary when the taking is accomplished by an excessive fee – all the court need do is order a payment back of the over-charge.)

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is taken through

conditions that demand disproportionate land dedication or excessive payment of impact fees. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., plurality dissent), adopted in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987). "[T]he Constitution measures a takings of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). This Court should hold that all land use exactions, whether of land or of money, are subject to *Dolan.*

II. THIS COURT NEEDS TO CONFIRM AGAIN THAT THE "ROUGH PROPORTIONALITY" AND INDIVIDUALIZED DETERMINATION REQUIREMENTS OF *DOLAN* APPLY EQUALLY TO LEGISLATIVE EXACTIONS AND TO ADMINISTRATIVE OR QUASI-JUDICIAL EXACTIONS.

This Court should grant *certiorari* in this case and reverse the Washington Supreme Court because that court incorrectly focused on a false distinction between legislative and adjudicative exactions. This Court has not made such a distinction, but instead has previously applied the Takings Clause to legislative actions, both in general and in *Dolan* itself. Nevertheless, the lower courts are confused, and this Court needs to set the record straight.

A. This Court Has Long Recognized the General Principle that Legislation Can Effect a Taking.

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. For example, in *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997) and *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987), this Court twice held the escheat provision of the

Indian Land Consolidation Act (25 U.S.C. § 2206) unconstitutional. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), the plurality opinion held the application of the Coal Industry Retiree Health Benefit Act of 1922 (2 U.S.C. § 9701-9722) unconstitutional for requiring millions of dollars in health care contributions based on a predecessor company's activities decades earlier. Thus, the notion that government exactions are somehow immune from takings analysis if they are imposed by legislation has no basis as a general principle.

Most of this Court's previous holdings in this regard, however, did not involve exactions in the land use context. Given a plethora of lower court decisions seeking to avoid the mandate of *Dolan*, this Court should now make it clear that exactions that are not roughly proportional to the impact of a proposed development require just compensation, regardless of how the exactions are imposed.

This simple conclusion makes sense. As stated before by Justice Thomas, "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

B. *Dolan* Itself Involved an Exaction Imposed by Legislation.

The Takings Clause requirement that exactions be roughly proportional was decreed in a case that was itself instigated by a legislative requirement instead of an *ad hoc* administrative determination. At issue in *Dolan* were

dedications required pursuant to the Tigard, Oregon Community Development Code ("CDC"). As this Court explained in *Dolan*:

> The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, . . . The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."

512 U.S. at 377-78.[3] Thus, the predicate for the numerous decisions which turn on whether the exaction is imposed by legislative or administrative means is not justified by reference to this Court's original decision.

There is, of course, language in *Dolan* that may suggest a distinction between legislative and administrative actions. But it is a false distinction. The language appears in a discussion of cases involving general land use restrictions:

> First, [those cases] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

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[3] Some analyses point to footnote 8 in *Dolan*, which states, "Here, by contrast, the City made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 391 (emphasis added). However, Justice Souter, in his dissent, clarified the situation by pointing out that footnote 8 misstated the genesis of the condition: "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions [citations omitted], but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

512 U.S. at 385. Those seeking to avoid the rough proportionality requirement seize on the above term "legislative determination." But the contrast emphasized by the Court was between *classifications*, on the one hand, and *conditions*, on the other. While the requirement of rough proportionality does not apply to the first (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999)), it does apply to the second, regardless of whether the condition applies to all properties in an area by legislative decree, or just one property by administrative determination.

C. There is Great Confusion in the Lower Courts.

"The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

The problem is widespread and the consequent results inconsistent. In addition to the cases cited by petitioners, the Illinois Appellate Court held in *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 941-43, 661 N.E.2d 380, 390-91 (1st Dist. 1995), *leave to appeal denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 519 U.S. 976 (1996), that there is no reason to differentiate between exactions imposed legislatively or by adjudication.

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One commentator reviewed 29 cases construing *Dolan* and concluded that the lower courts are simply confused. "The survey of the caselaw reveals that the lower courts' application of the legislative/adjudicative distinction is inconsistent." *Note, The Distinction between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 256 (2000). The conflict in the lower courts makes the grant of *certiorari* all the more compelling in this case. *See Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

D. The Legislative/Administrative Distinction is Beset by Practical Difficulties and Gives Rise to Perverse Incentives.

This Court should clear up the post-*Dolan* confusion not only because inconsistent lower courts are misapplying the law but also because the distinction between exactions by legislation and exactions by administrative determination cannot be so easily drawn. It is another false distinction that encourages municipalities to shift public costs away from voters and on to those who have no voice in municipal affairs. "The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." James L. Huffman, Dolan v. Tigard: *Another Step in the Right Direction,* 25 Envtl. L. 143, 152 (1995).

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exactions but not to those imposed by legislative fiat is in fact fraught with practical difficulties. It is also bad public policy, because the distinction allows municipalities the too-easy opportunity to simply push the costs attendant to development on a small number of individuals. Furthermore, in many cases of residential development the payor is an out-of-town corporation and those residents ultimately bearing the cost of the impact fee (through higher home prices) are the buyers of the homes yet to be built – two groups who lack the right to vote in municipal elections.[6] Thus, the idea that the democratic process could be a sufficient check on extortionate impact fees is not supportable. *See Town of Flower Mound*, 135 S.W.3d at 640-41.

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III. IMPROPER EXACTIONS HURT AFFORDABLE HOUSING.

The confusion in the law is bad enough. Worse is the consequence of continued confusion: more improper exactions on homebuilders, and less affordable housing for the public. This Court should grant *certiorari* now to stop municipalities from continuing to impose what amounts to a silent tax that limits the stock of affordable housing.

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or pay money to public agencies as a condition to granting land use, subdivision, and even non-discretionary construction approvals. In this case, a city required a developer – in fact requires all developers within its jurisdiction – to pay a fee that was based not on the specific impact of a particular development, but on the average impact of all anticipated development in the city. This case thus presents two issues of great importance to NAHB and its members.

First, do the requirements of *Nollan* and *Dolan* apply to impact fees that are imposed on property owners as a condition of permit approval, where those fees have the same economic impact on property owners as dedications of land? This Court's previous pronouncements place impact fees with such effects squarely within the category of "exactions," a form of taking that constitutionally requires just compensation. NAHB members need this Court's protection when impact fees threaten to become "not a valid regulation of land use but 'an out-and-out plan of extortion'" (*Nollan*, 483 U.S. at 837), just as much as they do when the government requires a dedication of land.

Second, may a local government avoid *Dolan*'s requirement of "rough proportionality," and its attendant burden on the local government of making an individualized determination, by passing a legislative exaction on an area-wide basis? NAHB members need this Court to rule that government may not use its permitting power to force *all* new developments to pay more than their fair share, any more than government may require *one* development to pay more than its fair share.

The protection from over-reaching and excessive governmental exactions embodied in *Dolan* is particularly important in the context of affordable housing. By shifting disproportionate costs of public services on to new housing,

exactions that do not comport with *Dolan* erect more imposing barriers to affordability. These barriers compound what is already a significant and serious social problem plaguing this country.

The lower courts have reached inconsistent and conflicting results when faced with these issues. Absent a clear ruling from this Court, NAHB members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. The Takings Clause is intended to prevent what occurred in this case and what home builders endure time and again: a local government forcing one landowner to bear the entire economic cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

SUMMARY OF ARGUMENT

Exactions are a type of taking that can trigger the payment of just compensation under the Fifth Amendment. Impact fees are one category of exaction. In the exaction context, the requirements of the Takings Clause assure property owners that the government must make an individualized determination of whether an impact fee is "roughly proportional" to the impact of a proposed development; and further guarantee that, when it is not, the government will be required to pay back the excess.

Exactions have the same economic impact on property owners whether they are imposed by legislation or adjudication, and *Dolan*'s requirements of individualized determination and "rough proportionality" should apply regardless of how the exaction is imposed.

By imposing excessive costs on development when impact fees or other exactions are levied without meeting the requirements of *Dolan*, local governments discourage the construction of affordable housing.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES EQUALLY TO EXACTIONS THAT ARE IMPACT FEES AND EXACTIONS THAT REQUIRE DEDICATIONS OF LAND.

As explained in the petition for *certiorari*, some of the courts that have refused to apply the *Nollan-Dolan* requirements to impact fees have viewed such fees as somehow categorically different from mandatory dedications of land. However, no abstract conceptualization or "critical leap" is necessary to equate these economic burdens. *Cf., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). Practically speaking, impact fees are simply one variety of exaction. In the land use context they must meet the constitutional requirements set forth in *Nollan* and *Dolan* to make sure that land use regulations do not over-reach by requiring the property owners who need a permit to bear economic costs that should be borne by the public as a whole.

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) summarized the kinds of takings that trigger the payment of just compensation. First, the "paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Id.* at 537. Second, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Id. Lingle* further clarified the "theories" available for "a plaintiff seeking to challenge a government regulation as an uncompensated taking" (*Id.* at

548) as encompassing regulations which: force a physical occupation, *e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); deprive a property owner of all economically viable use of the property, *e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); or "go too far" so as to become the functional equivalent of a traditional taking, *e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The final category of regulatory taking is "a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle*, 544 U.S. at 548. Exactions are a special application of the doctrine of "unconstitutional conditions," which provides that the government may not require a person to give up a constitutional right – such as the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. *Dolan*, 512 U.S. at 385.

The lower courts have developed a detailed understanding of exactions. They come in four recognizable categories: "(1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006).

The key to *Dolan*'s application of the Takings Clause to exactions in the land use context is that, in substance, it prevents governments from over-charging new development for the external, public costs it creates. Under *Dolan*, the exaction must be roughly proportional to the impact of the new development, as measured in an individualized determination made by the permitting body. If not proven to be roughly proportional, the Fifth

Amendment requires that compensation be paid for the excess. In this regard, disproportionate impact fees clearly fall within *Dolan*'s ambit just like other forms of exactions.[2]

Under the proper application of *Nollan* and *Dolan*, the "taking" only occurs where, and to the extent that, the monetary exaction exceeds what may be charged to the particular development under the rough proportionality test. Where a monetary exaction goes beyond the impact of the development, the local government is requiring the new development to shoulder a burden that should be borne by the public as a whole, and thus effects a taking. The constitutionally-required just compensation is then a return of that portion of the monetary fee constituting overpayment. In this regard, takings analysis is more finely tuned than substantive due process analysis when applied to impact fees. The former requires that an excess be paid back to the developer but allows the government to keep the justifiable portion of the fee. The latter simply invalidates the entire fee.

Even though this Court has made it clear that takings claims involving land use exactions in the form of physical dedications of property are evaluated under the *Dolan* "rough proportionality" test, the lower courts appear to

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[2] Some argue that five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) agreed that the Takings Clause did not apply to the mere payment of money, thus resolving the applicability of *Dolan* to impact fees. However, one of the five was Justice Kennedy, who confined his objection to a monetary obligation that was not imposed with respect to or on a particular property. 524 U.S. at 540. Impact fees are, of course, imposed with respect to development that occurs on a particular property, and so Justice Kennedy's opinion in *Eastern Enterprises* did not resolve the issue.

believe that applying *Dolan* to impact fees and monetary exactions "is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Ore Ct. App. 2003). *Compare Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429 (1996), *cert. denied*, 519 U.S. 929 (1996) (at least those monetary land use exactions that are imposed "on an individual and discretionary basis" are subject to *Dolan* scrutiny) *with Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) (all monetary land use exactions are subject to *Dolan*, whether imposed on an individual, discretionary basis or area-wide) *and Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821, 825 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214, 1219 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications).

This Court should clear the air. From a land owner's perspective, there is no practical distinction between exactions requiring land dedications and exactions requiring the payment of money. Each has an identifiable economic impact on the builder or property owner. Each is susceptible of the same kind of abuse by government. Each can be easily remedied by application of the just compensation requirement. (In fact, it may be easier to require just compensation for monetary exactions than for exactions of real estate. When the latter cannot meet the rough proportionality standard, a court must determine the value of the excess land that was taken by the permitting authority. This step is unnecessary when the taking is accomplished by an excessive fee – all the court need do is order a payment back of the over-charge.)

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is taken through

conditions that demand disproportionate land dedication or excessive payment of impact fees. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., plurality dissent), adopted in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987). "[T]he Constitution measures a takings of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). This Court should hold that all land use exactions, whether of land or of money, are subject to *Dolan.*

II. THIS COURT NEEDS TO CONFIRM AGAIN THAT THE "ROUGH PROPORTIONALITY" AND INDIVIDUALIZED DETERMINATION REQUIREMENTS OF *DOLAN* APPLY EQUALLY TO LEGISLATIVE EXACTIONS AND TO ADMINISTRATIVE OR QUASI-JUDICIAL EXACTIONS.

This Court should grant *certiorari* in this case and reverse the Washington Supreme Court because that court incorrectly focused on a false distinction between legislative and adjudicative exactions. This Court has not made such a distinction, but instead has previously applied the Takings Clause to legislative actions, both in general and in *Dolan* itself. Nevertheless, the lower courts are confused, and this Court needs to set the record straight.

A. This Court Has Long Recognized the General Principle that Legislation Can Effect a Taking.

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. For example, in *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997) and *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987), this Court twice held the escheat provision of the

Indian Land Consolidation Act (25 U.S.C. § 2206) unconstitutional. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), the plurality opinion held the application of the Coal Industry Retiree Health Benefit Act of 1922 (2 U.S.C. § 9701-9722) unconstitutional for requiring millions of dollars in health care contributions based on a predecessor company's activities decades earlier. Thus, the notion that government exactions are somehow immune from takings analysis if they are imposed by legislation has no basis as a general principle.

Most of this Court's previous holdings in this regard, however, did not involve exactions in the land use context. Given a plethora of lower court decisions seeking to avoid the mandate of *Dolan*, this Court should now make it clear that exactions that are not roughly proportional to the impact of a proposed development require just compensation, regardless of how the exactions are imposed.

This simple conclusion makes sense. As stated before by Justice Thomas, "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

B. *Dolan* Itself Involved an Exaction Imposed by Legislation.

The Takings Clause requirement that exactions be roughly proportional was decreed in a case that was itself instigated by a legislative requirement instead of an *ad hoc* administrative determination. At issue in *Dolan* were

dedications required pursuant to the Tigard, Oregon Community Development Code ("CDC"). As this Court explained in *Dolan*:

> The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, . . . The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."

512 U.S. at 377-78.[3] Thus, the predicate for the numerous decisions which turn on whether the exaction is imposed by legislative or administrative means is not justified by reference to this Court's original decision.

There is, of course, language in *Dolan* that may suggest a distinction between legislative and administrative actions. But it is a false distinction. The language appears in a discussion of cases involving general land use restrictions:

> First, [those cases] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

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[3] Some analyses point to footnote 8 in *Dolan*, which states, "Here, by contrast, the City made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 391 (emphasis added). However, Justice Souter, in his dissent, clarified the situation by pointing out that footnote 8 misstated the genesis of the condition: "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions [citations omitted], but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

512 U.S. at 385. Those seeking to avoid the rough proportionality requirement seize on the above term "legislative determination." But the contrast emphasized by the Court was between *classifications*, on the one hand, and *conditions*, on the other. While the requirement of rough proportionality does not apply to the first (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999)), it does apply to the second, regardless of whether the condition applies to all properties in an area by legislative decree, or just one property by administrative determination.

C. There is Great Confusion in the Lower Courts.

"The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

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[6] As the late Sen. Russell B. Long, former chair of the Senate Finance Committee, commented in the context of tax reform, "Don't tax you, don't tax me, tax that fellow behind the tree." Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations*, 401 (Oxford University Press 1993).

The question of just how much a developer is required to pay when new development is proposed is more than academic. It directly affects the ability and willingness of developers to provide badly needed housing. Economists may argue over just who bears the incidence of exactions – the homebuyer, the developer, or the landowner who sells to the developer – but there is no question that there is an impact. James C. Nicholas, Arthur C. Nelson and Julian Conrad Juergensmeyer, *A Practitioner's Guide to Development Impact Fees* 61-68 (American Planning Ass'n, 1991). Moreover, there is general consensus that it is the homebuyer who ultimately foots the bill for exactions in the long run.[7] Alan A. Altshuler and José A. Gómez-Ibánez, *Regulations for Revenue: The Political Economy of Land Use Exactions* 98 (Brookings Institution/Lincoln Institute of Land Policy, 1993); *Development Exactions* 55 (James E. Frank and Robert M. Rhodes, eds. 1987); and Thomas Snyder, Michael A. Stegman and David H. Moreau, *Paying for Growth: Using Development Fees to Finance Infrastructure* 100 (Urban Land Institute, 1986).

> Through various fees and assessments, as well as requirements for offsite improvements, communities can force developers to pay for infrastructure and public services associated with new development. Using their power to regulate land use, localities have gradually shifted the burden of supplying such infrastructure and services from the community at large to developers. Developers pass the costs along

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[7] Research shows that the average building company makes a net profit of only 5.4% before taxes. NAHB, *Cost of Doing Business: The Business of Building – Measuring Your Success* 7 (2004). Given the narrow profit margin, builders pass on as much of the cost of municipal exactions to home buyers as possible.

> to new homebuyers, in some cases adding substantially to the total cost of new housing.
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> Impact fees are regressive because they are assessed on a per-unit basis, rather than as a percent of the value of the home. Those who depend on affordable housing are forced to absorb fees that are a substantial percentage of the sales price of any home they purchase. For example, exactions, dedications, and fees account for as much as 30 percent of the cost of housing in New Jersey.
>
> One consequence of high fee schedules is that developers opt to build housing only for the higher end of the single-family market where fees can be absorbed more easily as a proportion of sales price. . . . Those who depend on more affordable housing are clearly disadvantaged when new development shifts to the upper income single-family end of the market.

"Not In My Back Yard," Removing Barriers to Affordable Housing, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, HUD 5806 (1991) at 2-10-11 (footnotes omitted).

The statements contained in *"Not In My Back Yard"* are as true today as in 1991. A California study a decade later confirmed the same conclusion and made several key points.

- California development fees are extremely high. Single-family homebuilders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of a sample of 89 cities and counties. Owners of new infill homes paid an average of

$20,327 per unit. Apartment developers paid an average of $15,351 per new apartment unit.

* * *

- Fee-setting is not routinely linked with capital improvements planning. Local capital facilities fees are usually determined using an average cost methodology, *e.g.*, historical or projected capital costs are divided by the current or project future population to yield a per capita or per household cost. As a result, the link between fees and longterm capital improvements programming (assuming such activities take place) is typically a weak one.

A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to higher housing prices, especially during periods of high housing demand. Among the key findings of the research in this area:

- California's high residential development fees significantly contribute to its high housing costs and prices. Among the sample of California jurisdictions, fees account for an average of ten percent of the median price of new single-family homes.

- The contribution of fees to home prices is greatest in affordable markets. Among individual communities in the sample, development fees accounted for less than five percent of new home prices in expensive communities. At the opposite end of the price spectrum, fees accounted for more than 15

> percent of new home prices in many jurisdictions that provide a significant share of their respective region's affordable housing – making the fee issue all the more significant.

John D. Landis, Michael Larice, Deva Dawson and Lan Deng, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* (Division of Housing Policy Development of the California Department of Housing and Community Development, 2001) at 1-3.

All this in a climate in which California alone will have to produce, on average, 220,000 housing units each year until 2020 just to keep up with the expected growth in population. John D. Landis, *Raising the Roof: California Housing Development Projections and Constraints, 1997-2020* (Division of Housing Policy Development of the California Department of Housing and Community Development, 2000) at 7-1.

It is not just California. A study of housing prices in King County, Washington came to exactly the same conclusion. Shishir Mathur, Paul Waddell and Hilda Blanco, *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urban Studies 1303, 1308-11 (2004). The decision in this case will, if left unchecked, unfortunately make it all the more difficult to obtain affordable housing in that state. Based on recent census data and typical lending practices, each $1,000 increase in the price of a $100,000 house drives 420,000 households out of the home buying market. NAHB, *Determining the Numbers of Households Priced Out of a Market* (2004). Unwarranted exactions on development sooner or later translate into higher home prices, and thus have a direct adverse effect on the nation's supply of affordable housing.

There is no practical way in which badly needed affordable housing can be provided unless the exactions imposed on new developments are limited to those roughly proportional to the impacts they create. This Court should grant *certiorari* to affirm the discipline imposed by the constitution on excessive government impact fees.

CONCLUSION

Developers in general, and NAHB in particular, do not dispute that new development should mitigate the impacts it creates. All that they ask is that they not be required to pay more than an amount roughly proportional to the impacts created – to be required to do no more than mitigate those impacts – which is what *Dolan* stands for. If all that is required to avoid the test of rough proportionality is to enact an exactions rate sheet, then *Dolan's* promise is gutted.

Accordingly, NAHB respectfully requests the Court to grant the petition for writ of *certiorari*, and reverse the decision of the Washington state supreme court.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has participated in the United States Supreme Court include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003); *So. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 125 S.Ct. 2655 (2005); *S.D. Warren Co. v. Maine Bd. Env'tal Protection*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).